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Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 60.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

A. J. TOWER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT, A. J. TOWER COMPANY.

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Opinions Below.

The opinion of the Circuit Court of Appeals (R. 118-123) is reported in 152 Fed. (2d) 275. The decision and order of the National Labor Relations Board (R. 10-16) are reported in 60 N.L.R.B. 1414.

Jurisdiction

The jurisdiction of this Court rests on Section 240(a) the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. Section 347(a)), and on Section 10(e) of the National Labor Relations Act (29 U.S.C. Section 160(e)).

Questions Presented.

1. Whether under any circumstances the National Labor Relations Board (hereinafter sometimes referred to as the Board) may properly find an employer guilty of an unfair labor practice for refusing to bargain with a union chosen as bargaining representative by the vote of 50% of the employees in the unit involved plus the vote of one person not an employee of the employer.

2. Whether, when a Consent Election Agreement provides that "Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after the issuance of the Tally of Ballots," the National Labor Relations Board may hold that an objection to a determination of representatives based on the results of a ballot on the ground that such ballot contained the vote of a non-employee was waived although filed with the Regional Director within five days after the issuance of the Tally of Ballots.

3. Whether the ruling of waiver by the Regional Director under the circumstances set out in paragraph 2 above was arbitrary or capricious.

4. Whether the National Labor Relations Board may escape its statutory obligation to determine who is the exclusive bargaining representative of employees under the National Labor Relations Act by permitting *some* of the parties to be affected by such determination to make a private agreement that the determination of such question by the Regional Director shall be final and binding on *all* parties affected by the determination, and in addition thereby avoid all judicial review of such determination by the Regional Director.

5. Whether the National Labor Relations Board may avoid judicial review of its acts by providing by rule that

in the case of consent elections the rulings of its Regional Directors shall be final.

Statement of the Case.

The facts upon which the present controversy turns may be briefly summarized as follows:

Under date of April 27, 1944, the A. J. Tower Company (sometimes hereinafter called the Company) and Local No. 24, Waterproof Garment Workers Union (hereinafter called the Union), executed an Agreement for Consent Election (Exhibit B-3-B, R. 104). Under this agreement the Company furnished the Regional Director of the National Labor Relations Board, who was to conduct the election, with a list of employees on its payroll for April 21, 1944, the payroll date fixed in the agreement for determining eligible voters (R. 105). On this list appeared the name of Jennie A. Kane and against it the notation "Out Sick" (R. 19). The fact was that Mrs. Kane had last actually done work for the Company on March 24, 1944, and did not enter the plant from that day until May 5, 1944, the date of the election, when she presented herself at the voting place and voted (R. 21). When the Company furnished the list above referred to it believed Mrs. Kane was out sick and had not left the Company's employ (R. 58). It was still under that belief at the time of the election and did not, therefore, challenge her voting.

The election resulted in 116 votes being cast in favor of the Union and 114 votes against it, with one additional vote challenged by the Union (Board Exhibit 3D, R. 107), which challenge has not yet been passed upon. A day or two after the election, an employee came to the superintendent of the respondent's plant and made a protest because Mrs. Kane had voted, stating that she had left the employ of the Company prior to the election (R. 56, 57).

The superintendent investigated the complaint by going to the office of the United States Employment Service (R. 58), where he found that Mrs. Kane had on April 28, 1944 (Respondent's Exhibit 1, R. 60, 116) registered as available for employment. He also learned she had applied to the Division of Employment Security of the Commonwealth of Massachusetts for unemployment benefits (R. 59, 110). Knowing that, if Mrs. Kane had applied for such benefits, a notice must have been sent to the Company, the superintendent returned to the plant and had a search made of the Company's files (R. 59), resulting in finding a notice from the Division of Employment Security of the Commonwealth of Massachusetts with a notation on it indicating it was mailed to the Company on May 1, 1944. This notice is set out in full on pages 116 and 117 of the Record. This notice stated that Mrs. Kane had applied for unemployment benefits on April 28, 1944, gave the respondent as her last employer, the date of separation from employment as March, 1944, and the reason for separation as follows: "Left—couldn't do heavy work of carrying bundles which was part of her job." This notice was found in the files of the Company by the factory superintendent on May 8, 1944, three days after the election. This was the first time the notice had come to his attention (R. 61). As it clearly indicated that Mrs. Kane was not "out sick" as the Company thought, but had voluntarily separated herself from employment with the Company as long ago as March, and as the superintendent had also learned in the course of his investigation, as already indicated, that on April 28, 1944, Mrs. Kane had likewise registered with the United States Employment Service as available for work, the Company, on May 9, 1944, filed with the Regional Director an objection to his basing any determination of representatives upon Mrs. Kane's ballot, the objection being grounded on the fact that Mrs. Kane was not an employee at the time she

voted. The objection was filed within the five days provided in the Consent Election Agreement for filing objections to the conduct of the ballot or "to a determination of representatives based on the results thereof" (R. 20). The objection appears in full at pages 114-115 of the Record (Exhibit B-6).

The Regional Director made an investigation of the objection and held a conference with the parties at which the Company presented a signed statement of Mrs. Kane's admitting she had applied for unemployment compensation benefits prior to the election and that she had cast her vote for the Union at the election (Exhibit R-2, R. 62, 117). The Regional Director then filed a Report on Objections in which he failed to find whether or not Mrs. Kane was an employee at the time she voted (R. 111), but in which he held that the Company by "oversight" failed to challenge Mrs. Kane at the balloting (R. 112) and that by thus failing to challenge Mrs. Kane at the balloting, had waived its right "to challenge her vote or to object to the election on this ground" (R. 111). The Regional Director then proceeded to "find and determine" Local No. 24 was the "exclusive representative of all employees" in the unit (R. 111).

Thereafter the Union requested the respondent to bargain with it and the respondent refused on the ground that the Union had not been validly chosen as the bargaining agent of a majority of the employees in the unit (R. 112, 113). The complaint of unfair labor practice from which the present proceeding stems was thereupon issued by the National Labor Relations Board (Exhibit B-1, R. 94), a hearing was held before a trial examiner, and the Board finally issued its decision confirming the ruling of the Regional Director that the respondent had lost its right to challenge the status of Mrs. Kane and that accordingly it was guilty of an unfair labor practice under section 8 (1) and (5) of the National Labor Relations Act in refusing to

bargain with the Union chosen on Mrs. Kane's vote. The order customary in cases of refusal to bargain was then issued by the Board and enforcement sought before the United States Circuit Court of Appeals for the First Circuit. That Court (R. 118-124) refused to enforce the order on the ground that the National Labor Relations Act "does not give the Board or the Court power to compel an employer to deal with a union which was not selected by a majority of his employees" (R. 121).

Summary of Argument.

I. The Board is without jurisdiction to find the respondent guilty of an unfair labor practice unless the employer has refused to bargain with a representative chosen by a majority of the employees in the unit. What is an unfair labor practice is defined wholly by statute and neither waiver nor estoppel can enlarge it.

II. The decision of the Regional Director, confirmed by the Board, that the Company had waived its right to challenge the vote of Mrs. Kane or to object to the election because of her vote cannot be sustained.

III. The decision of the Regional Director was arbitrary and capricious, and therefore cannot be allowed to stand.

IV. A determination of a bargaining representative pursuant to a private agreement between the respondent and the Union does not relieve the National Labor Relations Board from the obligation of determining that such representative meets the statutory requirements when it seeks to hold the respondent guilty of a statutory unfair labor practice in refusing to deal with such representative.

V. The National Labor Relations Board may not delegate its statutory duties or avoid judicial review of its acts by providing by rule that in the case of consent elections the rulings of the Regional Director shall be final.

Argument.

Point I.

THE BOARD IS WITHOUT JURISDICTION TO FIND THE RESPONDENT GUILTY OF AN UNFAIR LABOR PRACTICE UNLESS THE EMPLOYER HAS REFUSED TO BARGAIN WITH A REPRESENTATIVE CHOSEN BY A MAJORITY OF THE EMPLOYEES IN THE UNIT. WHAT IS AN UNFAIR LABOR PRACTICE IS DEFINED WHOLLY BY STATUTE AND NEITHER WAIVER NOR ESTOPPEL CAN ENLARGE IT.

A.

The National Labor Relations Board is wholly a creation of statute. Its jurisdiction and powers depend upon statute. The types of conduct which it is empowered to prevent, denominated unfair labor practices, are wholly defined by statute. Unless the Board can found its action in the present case on the statutory source of its power, it is without jurisdiction and its order is without effect and should not be enforced. It should be borne in mind also that this is an unfair labor practice case, not a representation case. The charge is that the respondent did one of those things the *statute* has prohibited. Unless this charge can be made out, the order of the Board is not entitled to enforcement.

The Board's complaint in the present case, on which the finding of unfair labor practice was made, alleges in substance that on or about May 5, 1944, the Union was designated by the *employees* in the unit involved as their representative for collective bargaining and continued so ever since; that thereafter the respondent refused to bargain collectively with such representative and thereby committed an unfair labor practice (Exhibit B-1, R. 94). There is no question as to respondent's refusal to bargain with the Union; it asserts its freedom from any obligation to bargain. The only question becomes, therefore: was the Union duly

chosen as their representative by a majority of the *employees* in the unit? This, as a practical matter, depends on whether the vote of Mrs. Kane is counted as the vote of an employee. The Regional Director, however, whose decision the Board affirmed, did not pass on the question of whether Mrs. Kane was an employee, but ruled that "the Company has waived its right to challenge her vote or object to the election on this ground" (R. 111). (We shall discuss later the question of whether the Regional Director had any basis whatsoever for holding that the Company had waived its right to challenge Mrs. Kane's vote. It was undisputed that the Company had filed a challenge to her vote within the five days provided in the Consent Election Agreement for the filing of "objections to the conduct of the ballot or *to a determination of representatives based on the results thereof*" (emphasis added) (R. 105).) The Board, by majority decision, Member Reilly concurring on other grounds, held that the Regional Director was correct in ruling "that the respondent could not for the first time challenge the vote of Kane after the results of the election had been announced" and that the rulings of the Regional Director would not be "disturbed" (R. 11). It is thus apparent that neither the Regional Director nor the Board passed on the question of whether Mrs. Kane was an employee at the time she voted, and held, in effect, that the Union selected by the votes of a precise one-half of the employees plus the vote of Mrs. Kane* was the valid choice

* There were 116 votes cast for the Union in the election and 114 votes against it. The Union also challenged one vote. Although requested by the Company so to do (R. 114, 115), the Board has refused to date to pass upon this challenged ballot on the ground that, in the light of its decision as to waiver by the Company of the right to object to Mrs. Kane's vote, it is immaterial to determine the validity of the Union's challenge. For the purposes of the present proceeding, therefore, it must be assumed that the challenge would be decided adversely to the Union and that

of a majority of the employees and the valid representative of *all* employees, whether or not Mrs. Kane was an employee, and that the Company was guilty of an unfair labor practice in not bargaining with a Union so chosen. As the Board has thus decided that the Union was validly chosen whether or not Mrs. Kane's vote was that of an employee, we are entitled to test the correctness of that decision by assuming (as the Company believes the evidence shows) that she was not an employee. The Board is then in the position of saying that, where 115 employees vote for a Union and 115 employees vote against it, and a non-employee also votes for the Union, the Union is thereby to be deemed selected by a majority of the employees and to

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the ballot, when opened, would be a vote against the Union, bringing the tally to 116 votes for the Union, and 115 against it. Subtracting Mrs. Kane's vote from the Union's 116 votes would result in a tie ballot of 115 to 115 (R. 17, n. 1). Put another way, the Board has decided that 115 valid votes plus Mrs. Kane's vote, whether or not valid, have decided the election. The evidence is clear beyond peradventure that Mrs. Kane voted for the Union (see her own signed statement made three days after the election (R. 62; Exhibit R. 2, R. 156)); but even if, as the Board, for some strange reason, seems to feel (R. 12), it is improper to go into the question of how Mrs. Kane voted when that fact is vital to the rights of the Company and to the rights of the employees who voted against the Union, that would merely produce a situation where the Board would be unable to tell whether or not there had been a valid election. A finding of an unfair labor practice could not be based on any such absence of knowledge as to whether there was a valid election. The remedy in that case would be another election—a remedy which has been open to the Board from the beginning, and which has been frequently suggested by the Company, but which, for some inexplicable reason, the Board has always seen fit to ignore.

As to the propriety of inquiring into the fact as to how Mrs. Kane voted (which will be discussed more at length hereafter), it may be pointed out that in all elections, and they are not infrequent, which turn on a single vote and that vote is challenged, the Board as a matter of routine goes into the question of whom the vote is for.

be the representative of all. The Board then proceeds to hold a company guilty of an unfair labor practice for refusing to bargain with a union so chosen.

We submit that the position of the Board cannot be the law. The question of whether a union is selected by a majority of *employees* is a question of fact. It concerns not only the Company but the employees who voted against the Union, and under some circumstances it might concern other unions. It is the Board's duty to determine this fact. Its jurisdiction and power to act depends on this fact. The fact cannot be established by advertent or inadvertent waiver or estoppel. It is jurisdictional, and, if it does not exist, jurisdiction does not exist, and the whole attempt to find the respondent guilty of an unfair labor practice rests upon an unsound premise. The statute states that the bargaining representative must be chosen by a majority of the "employees." Until a majority is so chosen, there can be no refusal to bargain which violates the statute.

The above view, which found acceptance with the Circuit Court, had also been argued by the respondent before the Board and, while it was rejected by a majority of the Board, Member Reilly, who filed an opinion specially concurring in the result (R. 14-15), recognized the validity of the argument set forth above. As he put it:

> "Although I have consistently held that binding commitments may estop parties from utilizing the processes of this Board, I do not believe that any doctrine of estoppel is applicable here. The Board's jurisdiction under the Act to prevent an employer from engaging in unfair labor practices in violation of Section 8 (5) is restricted to instances where there is a refusal to bargain with a representative of a majority of employees in an appropriate unit. A determination that a labor organization is the majority repre-

sentative contemplated by the Act, where its designation as such depends upon ballots cast by individuals who were not employees when said ballots were cast, is clearly not within the Board's power. Therefore, *a fortiori*, no theory of 'waiver' or 'estoppel' will supply the Board with such jurisdiction" (R. 14-15).

The error in the Board's decision becomes emphatically clear if we look at it from the point of view of the employees. The only parties to this record are the Board and the respondent. The Board also recognizes (as, of course, does the Company) that the Union, although not a party of record, has an interest. It is impossible, however, to find anywhere in the record or brief filed by the Board any recognition of the fact that there are still other parties who have equally valid interests equally entitled to protection. These are the employees who voted against the Union, and, if the Company is correct (and the contrary cannot be assumed), there are just exactly as many of them as there are of employees who voted for the Union. If the Board's decision stands, the Union becomes the bargaining agent for all employees, those who voted against the Union as well as those who voted for it. The right not to be represented by a particular union is just as valid and sacred a right as the right to be represented by a union. That right belongs to the employees. The Company cannot bargain it away, or give it up by inadvertence or waiver. The employees who voted against the Union were parties to no Consent Election Agreement, had no observers at the polls, and no opportunity to file post-election objections. Yet, if the Board is correct, the rights of the one-half of the employees who voted against the Union have been prejudiced, lost and given away because the Company was guilty of an alleged "waiver." The Board thrusts upon those employees a statutory bargaining agent which has

not been selected in accordance with the statute and tells those employees that they must accept this agent because of something the Company is alleged to have done or failed to do. It is submitted that the Board may not thus add to the statute or deprive these employees of the right not to be represented by a particular union unless that union has been chosen by a majority of *employees*, not by a bare one-half of the employees plus the vote of a non-employee or the vote of a person who may or may not be an employee.

The position of the Board and of the employees who voted against the Union may be highlighted, perhaps, if we consider what would happen if the Union and the Company had expressly agreed in advance of the election that a non-employee or a dozen or a hundred—the principle is the same—might vote in the election and have their votes counted and the votes of these non-employees were decisive of the election. Would the Board certify a union so chosen or hold the Company guilty of an unfair labor practice in not bargaining with a union so chosen? Or what would the Board do if the agreement happened to be with the 50% of the employees who did not want the Union and the Union was thereby defeated? The answer in either case is obvious. If the Company cannot bring about this result designedly and expressly, how, it may be asked, may it do more by inadvertence or waiver?

Another and very common situation will illustrate the unsoundness of the Board's position in this case. Let us assume there had been two unions on the ballot and that Union A received one more vote than Union B and no votes were cast for any third alternative, so that on the face of the balloting Union A had a majority of the votes cast and would appear to be entitled to certification as exclusive bargaining representative. Let us also assume that, paralleling the instant case, it developed that two of those who voted for Union A were non-employees, but had

not been challenged at the moment of balloting. Upon these facts it would be clear that a *majority* of the *employees* voting had selected Union B and not Union A. Would the Board, nevertheless, be warranted in directing the Company to bargain with Union A? Must the Company under penalty of being charged with an unfair labor practice by the Board bargain with Union A and refuse to bargain with Union B, thus committing the undoubted unfair labor practice under the law of refusing to bargain with the representative in fact chosen by a majority of the employees? Can the "oversight" of the Company in failing to challenge at the polls thus change the Congressional mandate that the bargaining representative shall be that one the majority of the *employees* choose?

It may be argued, however, that in the case just put Union B might have had no knowledge of the non-employee status of the two employees at the time of their voting, and therefore might not be guilty of oversight in not challenging at the polls. This raises several interesting possibilities and demonstrates how completely involved in inconsistencies the Board must become once it departs from the clear statutory requirement that representation must depend on actual majority choice of *employees* and attempts to rely upon such illusive doctrines as estoppel and waiver. Thus, in the circumstances just suggested, if Union A demands bargaining rights, the Company must grant them since the Company is estopped, upon the Board's theory in the present case, from questioning the two non-employee votes. If, however, Union B demands bargaining rights, the Company should grant those too, because, on a parity of reasoning, Union B is not estopped from questioning the two non-employee votes. It will be answered to the foregoing that, of course, the Board would not allow itself to be put in the position where this absurdity could arise, but would throw out the challenged

ballots once and for all. This may well be true, but the Board could do this only at the sacrifice of its logic in the present case, and by recognizing the principle here contended for by the respondent. Moreover, what will the Board do with the case where Union B did technically have knowledge that the two individuals were non-employees, but through oversight failed to challenge them at the polls? Is the Board going to say that the bona-fide majority of the employees who chose Union B as their bargaining agent have lost their right to the representation the statute undertook to give them and must patiently submit while the Company engages under order from the Board in the unquestioned unfair labor practice of making a contract with Union A?

All of the foregoing focuses attention on what is a basic misconception by the Board of what the National Labor Relations Act demands and what its function is under the Act. The Board in the instant case has acted as if the question of whether the Union was the legal bargaining representative of the respondent's employees was a matter between private litigants or private contracting parties. What the Board does not appear to appreciate is that the question of who is the legal bargaining representative of any particular group of employees is not solely a question between the employer and the Union. It is a question in which the Company and the Union are concerned to be sure, but it is also a question in which all employees are concerned, both those who voted for the Union and those against it. It might also have been a question in which another union was concerned had there been another in the ballot, as there frequently is, and it is certainly a question which concerns any union which might be considering offering itself as bargaining agent in the future. Lastly, and not at all of least importance, it concerns the public which is entitled to look to the Board to administer the law as

written by Congress, and to reduce industrial strife by assuring to workers that they are represented by the agents a majority of them actually choose. This means that the determination of whether a union has been chosen by a majority of employees in a unit requires something in the nature of a finding *in rem*, a fair and judicial determination of what the fact is which will be the same for all parties at all times, and will not be for any a fiction which they are required to accept because of technical doctrines of waiver and estoppel. The statute gives warrant to the Board for proceeding on no other basis.

In *In re Chrysler Corporation*, 63 N.L.R.B. 866, the Board has again undertaken by a majority vote to permit an election to be decided by the vote of a person not an employee, relying on its decision in the instant case as its only authority and precedent. Member Reilly dissented and his discussion of the doctrine of the majority is pertinent in the present connection:

> "In the Tower case (*Matter of A. J. Tower Company*, 60 N.L.R.B. 1414), relied upon by the majority, I concurred specially, as it seemed to me that other facts in the record indicated that the voter whose employee status was in issue was still in the employ of the company on the day the poll was taken. Here we have nothing to support such a conclusion. While I recognize the administrative advantages in the doctrine of the majority decision, I do not believe that the failure of an employer to exercise his right of challenge affords a basis for counting the vote of a person who is, *ex hypothesi*, a non-employee. Such a rule is salutary when the issue is limited to the question of whether a certain voter, conceded to be an employee, is within one of the eligible categories described in the appropriate bargaining unit, for the statutory duty of

defining the bargaining unit vests this Board with broad discretion.

"It should be remembered that representation proceeding involves not only the rights of the parties of record (i.e., the company and the putative representative), but also the rights of third parties, the employees—the only persons having any affirmative rights under the statute. Under the Act, we have no power, either upon our own motion or by stipulation of the parties of record, to certify a bargaining representative selected in whole or in part by persons other than employees. Even assuming, therefore, that the failure of the company to challenge the Taylor vote was a waiver of a procedural remedy, I have difficulty in understanding how a waiver can confer on this Board a power which could not be conferred upon it by express authorization. It is fundamental that the doctrine of constructive waiver cannot cure a jurisdictional defect.

"It would seem to me, therefore, that this case should be disposed of either by ordering a new election or by remanding the case to the Region so that evidence may be adduced with respect to the status of the disputed voter" (63 N.L.R.B. at pp. 869-870).

One or two points mentioned in the Board's decision require passing comment. The Board states (R. 12):

"We have consistently adhered to the salutary doctrine of not considering post-election challenges because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result."

Passing over the point, which will be discussed later, that this was hardly a post-election challenge since it was made within the five days permitted by the Consent Election Agreement, or, if it was one, was a challenge permitted by the terms of the Agreement, it is submitted that the Board's desire to avoid a "protracted resolution of objections" cannot furnish a basis for disregarding statutory obligations. Moreover, whatever might be the situation if the objection in the present case was "disregarded or suppressed against the contingency of an adverse result," there is not the slightest evidence that that was the case. The Company's evidence was to the effect that the notice from the Division of Employment Security of the Commonwealth of Massachusetts, which was the first intimation the Company had that Mrs. Kane had quit its employ, was received by a clerk and filed without coming to the attention of the executive who was acting for the Company in connection with the election (R. 61; 79, 80). The most that the Regional Director charged the Company with was that "in the opinion of the undersigned it failed, *through oversight*, to correct the voting list or challenge the eligibility of Mrs. Kane when she appeared at the polls" (emphasis added) (R. 112). There is nowhere the slightest suggestion that the Company "disregarded or suppressed" an objection "against the contingency of an adverse result." Nor has a possible motive for doing such a thing been suggested or any possible gain which the Company would achieve by holding back an objection to Mrs. Kane's status. The Board's suggestion, therefore, if it amounts to that, that the objection in this case was withheld for ulterior purposes is entirely gratuitous and unwarranted by anything in the record. The same comment may be made as to the implication in the Board's brief in this Court that the facts had been hidden by the respondent (Brief for the Board, p. 72).

The respondent recognizes that there may be situations where objections might be deliberately held back for long periods of time for the purpose of using them at an opportune moment to discredit a union or where, even acting in good faith, an employer might not become advised of the existence of grounds for an objection until long after an election, and that to permit the bringing up of objections under these circumstances long after an election may be from many points of view undesirable. Whether or not, when such a situation arises, the Board or the Courts should feel empowered to deal with it even in disregard of the statutory requirement that bargaining representatives should be chosen by employees, not by non-employees, or whether that situation will require further legislation for correction the respondent is unable to say. Suffice it for the present case that it does not present a situation such as that imagined. The objection was not suppressed out of malice or with evil intent; and it was promptly made when it finally came to the attention of the executive representing the Company in the election proceedings and within the five days following the election permitted for "objections to the conduct of the ballot, or to a determination of representatives based on the results thereof" (R. 20, 105).

Before closing the discussion of this part of the case, some reference should be made to *N.L.R.B.* v. *Capitol Greyhound Lines*, 49 N.L.R.B. 156, 140 Fed. (2d) 754, cert. den. 322 U.S. 763, the case chiefly relied on by the Board in its brief. In that case the direction for an election provided that the employees eligible to vote should be those on the Company's payroll during the payroll period ending July 31, 1942. The election was to be held on September 2, 1942. The Company was requested to make up a list of eligible employees and the clerk assigned to this duty made up a list from the payroll of August 15 on the assumption that it was the same as the payroll of July 31. As a matter of fact

between the two dates one new employee (Nolan) had been hired. This employee voted at the election without challenge. The employer later discovered the mistake which had been made and objected to the certification of the Union. The Board refused to set the election aside. The Circuit Court sustained the Board. Although language may have been used by the Board that may have gone beyond the need of the case, it is clear that the decision contains nothing startling or in any way decisive of the present case. The election was decided by *employees*, and by a majority of employees. The Board has entire discretion, within reasonable limits, as to saying whether the payroll list of one date or of another date shall be used to determine the list of eligible voters. The Board indicated originally the use of the payroll list of July 31st. The Company in fact used the payroll list of August 15th, a date nearer the election and therefore, if anything, a more representative list than the earlier list would be. All the Board did by decision was to affirm the use of the more recent list of employees. It could have ordered the use of such list in the beginning. When it turned out to be the list in fact used, it is hard to see what could prevent the Board in affirming such use. The result was that the Union was chosen by a majority of the employees who were such at the time of the election, and that is a full compliance with the statute. The decision in no way supports a contention that the Board may permit elections to be decided by non-employees.

B.

We now turn to the question of what the Board has to say in its brief in support of its decision to allow the election in this case to be decided by the vote of a person who, for the purposes of this case, must be assumed to be a non-employee. In Part I of the brief in this Court the Board

seeks to justify its action without reference to the Consent Election Agreement; in Part II the Board urges the Consent Election Agreement as a justification. This part of the respondent's brief will deal only with Part I of the Board's brief. Part II of the Board's brief will be treated under subsequent points of the respondent's brief.

The Board's argument in Part I of its brief, very succinctly put, is that it has a "rule" not to entertain post election challenges to eligibility of votes, that such rule is "reasonable," and, therefore, that it is justified in this case in holding the respondent guilty of the unfair labor practice of refusal to bargain even though the bargaining representative was not chosen by a majority of employees as required by statute.

At the outset it may be noted that this argument represents a new position different from that on which the Board based its decision, and a position not urged by the Board in the Circuit Court of Appeals. In its decision the Board, while stating that the action of the Regional Director was "in complete accord with the established principles and policy of the Board" (R. 12), in fact rested its decision upon the principle that it would "not disturb the rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" (R. 11). In its brief in the Circuit Court the Board did no more than reassert this position. The following from page 9 of that brief will summarize the position of the Board before the Circuit Court:

> "The Board has, therefore, consistently ruled, in accordance with the provisions of the consent election agreement, that it and the parties are bound by determinations of the Regional Director under consent election agreements, in the absence of capricious or arbi-

trary conduct on his part, much as the award of an arbitrator under an arbitration agreement is binding in the absence of fraud or such gross mistake on the part of the arbitrator as would necessarily imply bad faith. And it was in line with this established policy that the Board refused to redetermine the issue of majority in this case."

It is thus for the first time in this Court that the Board seeks to shift ground and to support its decision upon a new principle urged by it. Without at this juncture going into the propriety of the Board's doing this, it is submitted that the new principle urged will not answer the Board's purpose. In the first place, the Board presents its argument as if it had adopted and promulgated a formal rule or rules about its non-acceptance of post-election challenges. Thus on page 31 of its brief it states: "Judged by the test of reasonableness, we submit that the Board's rules representing post-election challenges are valid." On pages 78-82 of its brief, however, the Board presents what it refers to (p. 78) as the "pertinent provisions of the Rules and Regulations of the National Labor Relations Board." These Rules and Regulations are not part of the record on certiorari and were not before the Circuit Court of Appeals, and it is questionable if the Board may now urge their consideration by this Court. Passing that, however, a close perusal of these Rules and Regulations will reveal that they do not embrace at any point, in the case of either an ordered election or a consent election, any rule that the Board will not consider post election challenges. Indeed, so far as ordered elections are concerned—and in its brief the Board places much reliance on its procedure in ordered elections as supporting the reasonableness of its "rules"—there is every indication that post-election challenges will be considered as the only mandatory requirement as to

making any objection to an election in that "within five (5) days thereafter the parties may file . . . an original and three copies of Objections to the conduct of the election or conduct affecting the results of the election" (Section 10 of the Rules and Regulations, Petitioner's Brief, p. 79). There is no requirement that challenges be made to ballots at any specific time, let alone at the time of the balloting, and there is not the slightest indication that an objection to an election on the ground that a non-employee voted in it may not, as well as any other objection to the conduct of the election, be filed within five days after the election is held. The rule (Section 12 of the Rules and Regulations, Petitioner's Brief, pp. 81-82) relative to consent elections is equally barren of any provision barring the consideration of post-election challenges or objections.* It is thus apparent that, when the Board speaks of its "rules respecting post-election challenges," it is not referring to any rule duly made and promulgated under its statutory rule-making power. Whether any rule so promulgated that challenges must be made at the time of balloting or never would be valid we do not need to inquire. It is clear that no such rule has been promulgated and we have no such situation as that to deal with here.

What, then, does the Board mean when it speaks of its "rules respecting post-election challenges being valid" and urges that as a ground for allowing a non-employee to vote in an election? An examination of the Board's brief and of the cases cited by it (Petitioner's Brief, p. 41, footnotes 21 and 22) makes it clear that all the Board means is that in some cases it has, as a matter of decision in each case, refused to entertain post-election challenges, while in other cases it has entertained them, and that it thinks that, where it failed to entertain such challenges, its action was

* The provisions of the actual Consent Election Agreement involved in this case will be considered under Point II of this brief.

reasonable. Presumably in those cases in which it decided to entertain post-election challenges it also believes its decision is reasonable. It is thus clear that there is no "rule" about it even in a loose sense, but that, when the Board thinks it is not "reasonable" to entertain a post-election challenge, it does not do so, and when it thinks it is reasonable, it does do so. Thus it states that it does entertain post-election challenges if the Board's own agents knew of the ineligibility at the time of the balloting; or if the person to "benefit" from a refusal to entertain a challenge knew of the ineligibility (Petitioner's Brief, pp. 40-41).

Further, if we examine the ten cases cited by the Board in footnote 22 on page 41 of its brief which it offers as evidence of its "rule" not to entertain post-election challenges, we find all but *three* were decided subsequently to the Board's decision in the present case. All the remaining seven cases are, expressly or by inference, based on the Board's own decision in the present case. Of the three cases antedating the decision in the present case, the earliest, *Matter of American Granite Finishing Co.*, 28 N.L.R.B. 739, 740, while declining, for reasons given, to entertain a post-election challenge, refers to no "rule" on the subject; the next case, *Matter of Kellogg Switchboard & Supply Co.*, 28 N.L.R.B. 847, 852, 861, contains no express ruling that a post-election challenge will not be entertained, and the votes which were involved in that case could not have changed the result (p. 852); and the third case, *Matter of Capitol Greyhound Lines*, 49 N.L.R.B. 156, 157-159, is another case like the present where the Board took no action itself but merely refused to disturb action taken by the Regional Director under a Consent Election Agreement, and is a case, moreover, where the decision is supportable on entirely different grounds (see *supra*, pp. 18-19). As against these cases there is at least one flat decision antedating the present case where a post-election challenge was

entertained by the Board, viz., *Matter of Great Lakes Steel Corporation*, 15 N.L.R.B. 510; and one analogous case in which an election was set aside at the instance of the Company on the basis of a post-election objection by the Company that through error it had omitted nine eligible employees from the voting list, *Matter of Mobile Steamship Assoc.*, 11 N.L.R.B. 374. It is clear, therefore, that at the time of decision of the present case the Board had no clear or consistent rule that it would not entertain post-election challenges.

On this aspect of the Board's case and assuming, without conceding, that it is open to it to take for the first time in this Court the position it is now taking, the question is whether the Board may refuse to examine into the question of whether the bargaining representative was validly chosen because it feels in the particular case that it is "reasonable" to disregard the post-election objections to the non-employee status of a voter. It is submitted that there is no warrant under the law for any such position. This is an unfair labor practice proceeding. The Board has charged the respondent with refusing to bargain with the validly chosen representative of its employees. The respondent questions whether the representative was validly chosen—and this is the earliest time at which the respondent could raise the question in such way as to obtain Court review—and the Board declines to go into the question, but holds the respondent guilty of an unfair labor practice *whether or not* the representative was validly chosen. And the Board now defends this action upon the ground that it was "reasonable" to disregard the particular challenge.

The National Labor Relations Act makes no such provision for holding employers guilty of unfair labor practices irrespective of the facts, and because the Board thinks it is "reasonable" not to inquire into the facts. The mandate of Congress is that an employer shall be guilty of an unfair

labor practice of the character here involved only when he refuses to bargain with an agency chosen by a majority of *employees*. Congress gave the Board power to make rules "to carry out the provisions of this Act" (N.L.R.A. Sec. 6)—a power not made use of here, but which, even if availed of, would only permit the Board to "carry out" the provisions of the Act, not amend or add to them. The Board seems to feel that because the consideration of post-election challenges might add to its burdens or, as they believe, open the door to fraud or possibly lead to an invasion of the secrecy of the ballot, it is "unreasonable" to expect it to consider such challenges. We shall consider later how much substance there is to the Board's fears, but suffice it at this juncture to point out that where the objection is that the Act has not been complied with—that there has been no valid choice of representatives—the Board, until that objection has been eliminated, has no jurisdiction whatsoever, and it cannot assume jurisdiction merely on the basis of what it feels would be reasonable. If the Board feels that it should, under some circumstances, be permitted to hold employers guilty of unfair labor practices, not because they have committed or are committing them, but because at some point along the way they have been guilty of a procedural lapse, the Board should ask Congress to give it this power: it has no right to assume it. If the Board feels that a strict adherence to the provisions of the Act impose too severe a burden on it, and that there should be some procedural relaxation so that a method which produces a valid representative in the great bulk of cases may be followed in those cases where it does not produce a valid choice, again the Board's appeal should be to Congress.

The Board in the present instance seeks to analogize its position to that of this Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 560, where it was held that the provision in the Railway Labor Act that a

"majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class" meant, and was intended by Congress to mean, a majority of those electing to express their choice by balloting, provided a majority of the employees in the unit participated in the election. The situations are quite different. In the Virginian Railway Company case the statute was construed and the selection of representatives was found to be within the statute: a majority of employees had voted and a majority of that majority had selected the union. In the instant case, on the hypothesis on which the respondent is entitled to have the case considered, the representative has not been chosen in compliance with the statute—or at the very lowest the Board does not know whether the representative was validly chosen and says it does not care—but because of the alleged burdens or dangers which might come from post-election challenges, the Board wishes to disregard the statute and deal with the respondent as though the representative had been validly chosen. In other words, the Board would take the doctrine of the Virginian Railway case, and rewrite the National Labor Relations Act to read: a majority of those voting shall determine the representative, and it shall be immaterial whether or not they are employees unless that point is expressly raised by challenge at the time of the election. This, it is submitted, is not the construction of a statute, but the writing in of something not there. The fact that, had Congress so provided, such provision might be considered reasonable affords no excuse for the Board's assuming the prerogatives of Congress.

The foregoing has been written without giving any consideration to the question of how "reasonable" the Board really is in suggesting that it is proper to disregard the post-election objections in this case. This involves a point discussed in a later connection, but the facts warrant brief

consideration of it at this point. The facts are that the election in this case was held under a form of Consent Election Agreement which failed to contain a single word to the effect that challenges or other objections must be made at the time of balloting and would not be considered thereafter (R. 104-107). It was not mandatory, even, that the parties have observers present at the polls for the purpose of challenging: they were merely "allowed" (R. 105). The only mandatory provision in the whole agreement bearing on our present question was the provision of Section 7 of the agreement, headed: "Objections, challenges, reports thereon," the first sentence of which read:

> "Objections to the conduct of the ballot or *to a determination of representatives based on the results thereof,* may be filed with the Regional Director within five days after issuance of the Tally of Ballots" (emphasis added) (R. 105).

It is conceded that the respondent duly filed with the Regional Director within five days after issuance of the Tally of Ballots an objection to a determination of representatives based on the results of a balloting which contained the ballot of a non-employee (R. 114-115).

The Consent Election Agreement was on a printed form provided by the Board (see Petitioner's Brief, p. 56). The Board might have inserted in it a provision that all challenges must be made at the time of the balloting and that no post-election challenges would be considered, but it included no such provision. Instead, it gave notice to all and sundry that objections might be filed within five days after the election. The Board now, as will be pointed out later, seeks to make a nebulous distinction between an objection and a challenge, but it is clear that a challenge is one form of objection, and, as there was no requirement

that it be made before the five days, it would seem clear it could be made during the five days. Whatever the Board may be able to say about the "reasonableness" of not entertaining post-election challenges in ordered elections, its refusal to entertain the challenge in this case, far from being "reasonable," is completely lacking in equity.

The Board's position in this case is, moreover, in flat conflict with its decision in *Matter of Great Lakes Steel Corporation*, 15 N.L.R.B. 510, already referred to. In that case an election was held on August 18, 1939, and the Regional Director issued his report on election on *August 21, 1939*, showing that, out of 36 votes cast, 18 were for the Brotherhood of Locomotive Firemen & Enginemen, 18 were for the Independent Steel Workers Association, and that no votes had been challenged. The Independent Steel Workers Association filed objections on *August 25, 1939*, to the election report. As stated in the report of the case (p. 511), "*In its objections to the Election Report*, the Independent Steel Workers Association challenged the eligibility of one Cyril Delisle to vote in the election. . . . It claimed that Delisle had voted in favor of the Brotherhood of Locomotive Firemen & Enginemen and that the deletion of his vote would give it a majority of the votes cast." (Emphasis added.) Notwithstanding the fact that Delisle had not been challenged at the time of the election and notwithstanding the fact that the challenge was made several days after the election as an *objection* to the election report, both the Regional Director and the Board entertained the objection, considered it on its merits, and overruled the objection only because, after examining all the facts, they were able to make the flat finding that "Cyril Delisle was eligible to vote in the election" (p. 512). At no point does the Board make the slightest suggestion that a challenge is not an objection or that it could not be in-

cluded in a party's statement of objections to an election report or tally of ballots.

Although it seems hardly necessary in the light of the foregoing, for completeness we propose to discuss briefly the grounds which the Board advances as to why in the ordinary case it should refuse to entertain post-election challenges. The grounds which it gives are four: (1) If post-election challenges are entertained, employers may be guilty of fraud; (2) if post-election challenges are entertained, there may be delay in determination of bargaining representatives; (3) if post-election challenges are entertained, it may mean invading the secrecy of the ballot; and (4) if post-election challenges are entertained, the Board may have to change its election procedures. Each of these grounds will be considered in order.

So far as fraud is concerned, the Board feels that the allowance of post-election challenges may induce unscrupulous employers to include on the voting list the names of employees whose status as employees is "dubious or non-existent," and other possible maneuvers are mentioned whereby the basis might be laid for later invalidating the election through a post-election challenge (Petitioner's Brief, p. 43). It is hard to believe that counsel for the Board are seriously worried about these possibilities of fraud. It is difficult to see why an employer so dishonest as to resort to the schemes suggested—all of which assume dishonest co-operation of a number of employees or non-employees—merely to invalidate an election, would not adopt the more direct fraud of merely running in enough mattress voters to win the election, a fraud possible without any resort to post-election challenges. Also why does the Board assume that the only unscrupulous persons in the world are employers? Why does the Board not fear that its doctrine of not entertaining post-election challenges will encourage unscrupulous unions to

try to get all the persons who have at one time worked at a plant but who have quit to come back and vote at an election, since they would know that, if they were able to slip them by without challenge, later discovery of their non-employee status could not be availed of? The same would be true, too, if a union got entire strangers to vote and they got by without challenge. The short answer to all this is, of course, that dishonest people can always think up frauds and no human system is proof against them, and there is no more reason to suppose employers will be dishonest because post-election challenges are entertained than if they are not. Certainly there is no more reason for thinking that employers will take greater advantage of the post-election challenge situation than unions will of the knowledge that such challenges will not be entertained.

The second objection to the post-election challenge is that it may result in a "protracted resolution of objections" (Petitioner's Brief, p. 42). This objection has less merit even than the first one, at least when applied to the type of objection involved in this case. The question of whether a person is an employee or a non-employee is a very simple one, and usually very clear. In the great bulk of cases the employee is working on the day of the election, is on the payroll, and is on a particular job and the chance for any controversy is non-existent. The only opportunity, therefore, for "protracted objections" can be in the relatively insignificant number of cases in which, because of some special circumstances, some doubt as to status arises. If, as the Board presupposes, it is the desire of the employer to involve the proceedings in a "protracted resolution of objections," it is difficult to see why he may not accomplish this by a challenge at the time of the election just as much as by a post-election challenge. Moreover, even the fear of being involved in a "protracted resolution of objections" can hardly furnish warrant to the Board for departing from the statute. Its function, after all, is exactly that:

to resolve objections so that all parties may be assured that the bargaining agent who is to exercise exclusive bargaining rights is validly chosen. Congress did not say the Board might abdicate from this function whenever the resolution of objections became protracted.

Another form of the objection to post-election challenges just discussed is contained in the argument that "elections must be final at some point." "If," says the Board, "the time of the commingling of the ballots cannot be said to be a proper point before which a challenge to the eligibility of a vote must be made, no subsequent point of time could be set with greater validity. The decision below is based upon a principle which would permit the issue of eligibility to be raised at any time, even in a complaint proceeding following the election" (Petitioner's Brief, pp. 51-52). A short answer to the foregoing argument could be made that, so far as this case is concerned, the Board itself has picked out a point of time subsequent to the commingling of the ballots before which challenge may be made, this point of time being the end of the fifth day after the election (see *supra*, pp. 8, 27). From this point of view all that the respondent is asking is that the Board honor the time limit it has set itself. To dispose of this case, it is not necessary to decide the larger question as to whether a challenge at a subsequent time, "even in a complaint proceeding following the election," would be timely. On the larger question, however, the respondent is able to see nothing shocking in the possibility that the validity of an election might be attacked at some subsequent time. If the election was in fact invalid, why should it not be attacked? Everyone favors stability in industrial relationships, to be sure, but it is the stability of legally established relationships which should be protected, not those which by hypothesis have been illegally established. If, therefore, there was no jurisdiction in the Board to certify a union in the first instance, it is a

strange logic which complains that it is wrong to question this illegal certification at a later time. Instead of attempting to smother objections that it acted beyond its jurisdiction, should not the Board welcome them, and even be prepared of its own volition to invalidate certifications when it finds they are invalid? And as for the possibility that "even" in a complaint proceeding an employer might question the legality of the Board's action in certifying a union, how, it may be asked, is an employer to get the protection of judicial review of elections if he is not allowed to raise in complaint proceedings all questions going to their legality. The Board has been diligent in the past in persuading Courts that representation proceedings were not subject to direct judicial review; it can hardly complain if at the very least in complaint proceedings employers be given the right to try out all questions as to the legality of the certification.

The Board's plaintive wish that once it has made a determination of representatives it should never be questioned again is understandable, but is not supported by anything in the law. A certification once made is always subject and open to the attack that the bargaining agent has lost its majority status or that another bargaining agent has supplanted it as the preference of the majority. If these attacks against the status of an alleged bargaining agent can be made at any time, an employer, *a fortiori*, should be permitted to show that the claimed bargaining agent was not ever at any time the valid choice of the majority.

The next objection which the Board makes to post-election challenges is that it will mean an invasion of the secrecy of the ballot (Petitioner's Brief, pp. 44-48). In this part of their argument the Board is guilty of overlooking some very obvious facts, and of indulging in some very faulty reasoning. To begin with, the whole argument proceeds on the assumption that there is some statutory requirement that the secrecy of the ballot be preserved. However desirable

this principle may be and however much the Board should seek to secure it, the facts are that it is not required by the statute (a *secret* ballot is only one of the methods of determining representatives which may be used) and that the Board itself in its ordinary routine violates its alleged rule. This is true, of course, in the cross-check of cards where union membership is made known to Board agents or to third parties, such as certified public accountants, who make the check, or even to the employer, when, as sometimes happens, especially in small units, by agreement with the union, the employer makes the check itself. Beyond these cases, however, even in the ordinary election, the Board has no hesitation in invading the secrecy of the ballot when that is necessary to determine the result of the election. Thus if a ballot is challenged it is not dropped in the ballot box, but is placed "in a sealed envelope *which is* then marked to show whose ballot it contains" (emphasis added) (Petitioner's Brief, p. 39). If the election is a tie, except for the challenged ballot, it is obvious that when the challenge is passed on and the ballot is opened and counted, the whole world knows how that particular employee voted. As a practical matter, the same result occurs if there are several challenged ballots. Yet in none of these cases does the Board hesitate to invade the secrecy of the ballot. It does it, in other words, when it is necessary to do so in order to determine the results of the election, and should be equally willing to do so in the case of a post-election challenge.

Beyond this, however, in the particular case we are dealing with there would be no occasion to invade the secrecy of the ballot of any *employee*. The challenge here is to a voter on the ground that she was not an employee. That voter's vote has been cast and counted. If the Board should determine on the respondent's challenge that the voter was an employee, that would end the matter. It would not be necessary to make any further inquiry as to how she voted, be-

cause her vote, whatever it was, has already been duly counted and tabulated and reflected in the result. If, however, the Board should decide on the respondent's challenge that the voter was a non-employee, then there would be no reason whatsoever for not investigating to the fullest how she voted. Certainly the Board does not contend that a non-employee who illegally votes in an election has any right of privacy as to her ballot. If this point is appreciated, all the fine-spun arguments about the difficulty of determining how an "employee" voted go by the wayside. After all, it is only a simple question of fact, depending probably upon the credibility of one witness, the voter, and is no more difficult a fact to determine than other facts which the courts and the Board determine every day in the week All the fears which the Board purports to have that an "employee" may be afraid to tell the truth because he might offend his employer, or because, if it was a closed shop, he might offend the union and lose his job (Petitioner's Brief, pp. 45-46), are not realistic in this day and age; but in any event, the Board may relieve itself of its worries on those scores by realizing that the voter whose action it is inquiring into is not an "employee," has no "employer" to offend, or "job" to lose.

As a matter of fact, the post-election challenge in this case will involve far less invasion of the secrecy of the ballot than if the respondent had challenged at the time of the election. If the respondent had so challenged, the voter's ballot would have been segregated in an envelope with her name on it (Petitioner's Brief, p. 39). The challenge would then have been passed on at the end of the election, and if it was overruled, the envelope would be opened and the ballot counted. As it was a tie election, all the world would thus know how the voter voted; and this is strictly in accordance with the procedure the Board holds to be proper. Under the respondent's post-election challenge, however, if the

challenge is overruled no one will ever know how the employee voted. If the challenge is sustained, this will establish that the voter was not an employee and it will be immaterial, so far as employee ballot secrecy is concerned, how many know how she voted.

The final argument of the Board against post-election challenges is that, if they are permitted, it will be required "to alter its election machinery materially" and would not be able to handle "employee elections on the scale on which the Board has handled them in the past" (Petitioner's Brief, pp. 52-53). This is pure assertion and sure assumption. It is the type of *in terrorem* argument that a Government bureau always makes when there is any suggestion that it may have to depart from its established way of doing things. If the Board does have to alter its election machinery, may we not assume that it has sufficient ingenuity to accomplish the alteration successfully? In any event, can the necessity of such alteration excuse a departure from law? And as to handling elections on the same scale as in the past, Congress does not ask the impossible of the Board, and if complying with a law Congress has passed should really put undue burdens on the Board, may it not be assumed that Congress will provide for those burdens? Should we not, at any rate, assume that before we assume Congress intended this Board should depart from the law?

No analysis has been attempted of the cases and statutes cited by the petitioner with respect to political and corporate elections. We cannot see how the results arrived at under the vast variety of statutory schemes which govern such elections can prove helpful in dealing with the relatively simple problem presented in this case.

Point II.

THE DECISION OF THE REGIONAL DIRECTOR, CONFIRMED BY THE BOARD, THAT THE COMPANY HAD WAIVED ITS RIGHT TO CHALLENGE THE VOTE OF MRS. KANE OR TO OBJECT TO THE ELECTION BECAUSE OF HER VOTE CANNOT BE SUSTAINED.

If the Company is correct in its position taken under Point I, it is immaterial whether the Regional Director is correct or not in holding that the Company had "waived its right to challenge her [Mrs. Kane's] vote or to object to the election on this ground" (R. 111) or whether the Board is correct in refusing to "disturb" that decision (R. 11). If it does become material, it is the respondent's position that there is no basis for the holding that the Company had waived its right to challenge Mrs. Kane's vote or object to the election upon the ground that she was an employee.

The background of facts against which this question must be decided may be set forth as follows:

At the time of the election the respondent as a corporation had, it may be assumed, and technically speaking, knowledge that Mrs. Kane was not an employee: the notice from the Division of Employment Security (R. 116) had been received by a clerk in the employ of the Company and filed away (R. 61). Such knowledge was wholly technical and there is no evidence that the representatives of management acting for it in the election had any actual knowledge of this fact until after the election and it is clear that the Company's observers at the polls had no knowledge. Under these circumstances, Mrs. Kane was not challenged at the time she voted. At the very worst this was, as the Regional Director found, an "oversight" on the part of the Company (R. 112).

Was the Company barred forever from correcting this oversight? It is submitted it was not. The Consent Election Agreement, while providing (paragraph 6) that the

parties may have observers at the election polls "to assist in its conduct, to challenge the eligibility of voters and to verify the tally" (R. 105), contains no provision making it mandatory to have observers, or making it mandatory for them to exercise the right of challenge.* Nor is there any provision to the effect that, if a voter is not challenged at the polls, no objection to that voter may later be raised. On the contrary, the Consent Election Agreement specifically provides in paragraph 7, under the caption "Objections, Challenges, Reports Thereon," as follows:

> "Objections to the conduct of the ballot, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after the issuance of the Tally of Ballots" (R. 105).

This is the only mandatory provision as to election objections in the whole agreement, the only provision setting a time within which objections must be made.

The Monday after the election (which had been held on Friday, May 5th) an employee orally protested to the Company the allowing of Mrs. Kane to vote (R. 56-57) and the facts as to Mrs. Kane were thus, for the first time, brought to the actual knowledge of the Company's management, and, within the five-day period expressly given by the above provision, the Company duly filed its objection to the determination of representatives based on the results of the balloting if Mrs. Kane's ballot was included. This was a strict compliance with the Consent Election Agreement and, unless that agreement is a snare and trap for the unwary employer, it entitled the Company to urge any objection it had "to a determination of representatives based on

*As the facts in *In re Chrysler Corporation*, *supra*, disclose, some employers never station observers at the polls and never challenge at the polls.

the results" of the balloting. The Regional Director, however, without referring in any way to the provision of paragraph 7 quoted above or referring to the fact that it had been complied with, held the respondent had "waived" its right to object to Mrs. Kane's vote because it had not challenged her at the polls. "To hold otherwise," the Regional Director stated, would "vitiate," not the Consent Election Agreement, but "the Board's procedure" (R. 111). That this is no answer to the Company's contention that it had made timely objection in strict compliance with the Consent Election Agreement is obvious. After all, the provision giving five days for the filing of objections had some meaning. It cannot be blandly disregarded because otherwise the Board's "procedure" would be "vitiated."

The Board itself realized that the Regional Director had not dealt with the Company's contention that its objection was timely because made within the five days allowed by the Agreement and attempted itself to deal with it. Its language on this point, quoted in full, is as follows:

> "2. The respondent contends that its objection to the election on the ground that Kane was not eligible to vote, was filed within 5 days after the issuance of the Tally of Ballots, as provided in the consent election agreement, and hence was timely. The respondent has misconceived the purpose of this provision which is identical with that appearing in the Board's Rules and Regulations. The objections referred to in this provision relate to the conduct of the election and not to the eligibility of the persons who vote. An objection to the conduct of an election, if sustained, voids the results of the election; while a challenge, if sustained, merely eliminates the objectionable ballot. Here, the respondent's representatives certified that the election was properly conducted; its objection merely consisted of a challenge to the ballot of Kane on the ground that

she was ineligible to vote. Moreover, insofar as the respondent's objection may be said to concern the conduct of the election, the Regional Director considered and disposed of it on the ground that the respondent was in no position to be heard thereon" (R. 11).

It is to be noted that the Board does not actually quote the provision from the Consent Election Agreement to which it refers. Anyone reading the Board's opinion without reading the language of paragraph 7 of the Consent Election Agreement would receive the impression that paragraph 7 dealt with objections "to the conduct of the election" and not with anything else. Paragraph 7, however, is, as already pointed out, captioned "Objections, Challenges, Reports Thereon," and the first sentence, already quoted, reads:

> "Objections to the conduct of the ballot, *or to a determination of representatives based on the results thereof*, may be filed with the Regional Director within five days after issuance of the Tally of Ballots" (emphasis added) (R. 105).

The italicized part of this quotation is not referred to in the Board's opinion and its discussion as to the meaning of an objection to the election has no application to an objection to a determination of representatives based on the results thereof. It is hard to think of language more apt to describe the objection the Company is making. It is precisely what the Company is doing, objecting to the Board determining representatives on the result of a ballot which included the vote of a non-employee. The Board can reach the result which it does in its opinion only by disregarding altogether this part of the provision for objections. The form of Consent Election Agreement is pre-

scribed by the Board. It is not the employer's form. It would have been easy for the Board to provide that challenges should be made only at the polls. It would have been easy for the Board to omit the part of the provision in paragraph 7 under which the respondent acted. But having done none of these things, it ill becomes the Board now to disregard this part of the provision—they never expressly refer to it in their opinion—or, if we are to take their general discussion as covering it, to try to say by strained and refined reasoning that it does not have the obvious meaning which the respondent has attached to it. The Board should have left the five-day clause out of their form altogether, or b' prepared to accept and act upon objections made within the five days in reliance on the clause. It is submitted on the foregoing that any finding that in fact the Company had waived its right to object to Mrs. Kane's situation is entirely unwarranted.

Attention is also called to the fact that in *Matter of Great Lakes Steel Corporation*, 15 N.L.R.B. 510, where no challenge had been made at the time of an election, the Board entertained a challenge made for the first time several days after the election as an objection to the Election Report. No question was raised by the Board that the challenge was not also an objection, and the objection was considered on its merit. This case has already been discussed on page 28 of the brief, to which reference is hereby made.

One further and rather curious fact relating to this part of the Board's decision may be adverted to. After attempting to distinguish between a challenge and an objection to the conduct of an election, and, as already pointed out, without adverting to the fact that a challenge is at the very least an objection to the determination of representatives based on the results of the ballot, the Board makes this statement:

> "Moreover, insofar as the respondent's objection may be said to concern the conduct of the election, the Re-

gional Director considered and disposed of it on the ground that the respondent was in no position to be heard thereon" (R. 11).

Thus, after working a brave show or arguing that an objection that a non-employee voted is not an "objection to the conduct of the election," the Board at the end rather lamely appears to concede that it may be such objection. It then goes on to say, however, that "insofar" as it is such objection, the Regional Director "disposed" of the objection by finding that the respondent was in "no position to be heard thereon." But this, of course, is the whole point before the Board. If the Board's own form of Consent Election Agreement states that objections may be filed in five days and an objection is filed in five days, why is the Company not in a position "to be heard thereon"? What more does the Company have to do to preserve its right to be heard? Does not the Board in the passage quoted from its decision in effect give away its whole case? It recognizes the Company's challenge as an objection; it was an objection concededly made on time; the Board's position in refusing to pass upon it upon the merits becomes wholly indefensible.

In passing, note may be taken of the weight which both the Regional Director and the Board appear to place upon the fact that the Company's observers, immediately after the election, signed the "Certification on Conduct of Elections" (R. 111, 11). The certification appears in full on pages 106 and 107 of the Record. It was signed at a time when the observers had no knowledge of the question as to Mrs. Kane's status. And all it certifies to, moreover, is "that the balloting was fairly conducted," that "all eligible voters were given an opportunity to vote their ballots in secret" and that "the ballot box was protected in the interest of a fair and secret vote." There is nothing in the foregoing certification inconsistent with the claim that

nevertheless a non-employee was without the knowledge of those present at the time permitted to vote.

Point III.

THE DECISION OF THE REGIONAL DIRECTOR WAS ARBITRARY AND CAPRICIOUS, AND THEREFORE CANNOT BE ALLOWED TO STAND.

The Board appears to subscribe to a doctrine that the decision of one of its Regional Directors under a Consent Election Agreement shall not be disturbed by it unless such decision was "arbitrary or capricious" (R. 11). Whether such a doctrine is sound or not, we do not believe it has any application to the present case, because, as indicated under Point I, the question here is one of the jurisdiction of the Board to make any order. The Board cannot lift itself by its own bootstraps or by the bootstraps of its Regional Director. There is no jurisdiction to find the respondent guilty of an unfair labor practice unless the Union was selected as their representative by a majority of the *employees* of the respondent. The Board's decision refusing to disturb (R. 11) the Regional Director's determination that the right to question this fact was waived by the respondent does not supply the necessary fact or confer jurisdiction. This has all been pointed out at some length under Point I, and we do not mean to reargue it here. Assuming, however, that this was a case for application of the doctrine that a Regional Director's finding will stand unless arbitrary or capricious, and will not be allowed to stand if it is arbitrary or capricious, it is hard to find a case that presents, as a matter of law, more elements of arbitrariness and capriciousness. Without elaboration, this is what the Regional Director did:

(1) Although the Company filed its objection within the five days specified by the Consent Election Agreement,

he held, without even referring to this provision, that the objection was not timely.

(2) Although the Consent Election Agreement provides that he shall pass on "questions of eligibility of voters" "raised by any party" (R. 104, par. 1), he refused to pass on the question of eligibility of Mrs. Kane raised by the Company, but ruled that the Company had no right to raise the question of her eligibility.

(3) Although the statute states that a bargaining agent must be chosen by a majority of employees, he ruled that it was immaterial whether it was chosen by a majority of the employees or by a majority made up of employees and one non-employee.

The foregoing represents serious, obvious and flagrant disregard of the terms of the Consent Election Agreement under which he purported to act, and of the law which was the source of his authority. If such action is not to be adjudged arbitrary and capricious, it is hard to know what is.

Point IV.

A DETERMINATION OF A BARGAINING REPRESENTATIVE PURSUANT TO A PRIVATE AGREEMENT BETWEEN THE RESPONDENT AND THE UNION DOES NOT RELIEVE THE NATIONAL LABOR RELATIONS BOARD FROM THE OBLIGATION OF DETERMINING THAT SUCH REPRESENTATIVE MEETS THE STATUTORY REQUIREMENTS WHEN IT SEEKS TO HOLD THE RESPONDENT GUILTY OF A STATUTORY UNFAIR LABOR PRACTICE IN REFUSING TO DEAL WITH SUCH REPRESENTATIVE.

In the present case the Board is attempting to hold the respondent guilty of an unfair labor practice because of the refusal of the respondent to deal with a Union which a third person (not the Board) has determined to be the

statutory bargaining agent. The Board itself has made no finding or determination that the Union is the statutory bargaining agent. It expressly declines to make such determination. It thus lacks, it is submitted, any basis for determination of a violation of the statute.

The respondent and the Union entered into a so-called Consent Election Agreement (R. 104-106). Agreements of this character are not provided for in the National Labor Relations Act. The Board was not a party to the agreement. The employees, or at least those who were not represented by the Union, were not parties to it. It amounted to no more than a private contract between the Company and the Union, only two, but not all of the parties, in interest. This type of agreement has been expressly held, in *Sun Ship Employees' Ass'n, Inc.*, v. *National Labor Relations Board*, 139 Fed. (2d) 744 (1945), to be nothing but a private contract between the parties to it. In that case, as in the instant case, a Consent Election Agreement had been entered into between a company and a union on a form provided by the National Labor Relations Board and bore the written approval of the Regional Director. As in the instant case, the agreement provided that the Regional Director should have certain authority to make decisions. When the union sought to sue upon this agreement in the District Court of the United States for the Eastern District of Pennsylvania, however, the Board filed a plea to the jurisdiction, which was sustained. Judgment of the District Court, dismissing the suit for lack of jurisdiction, was affirmed in the Circuit Court of Appeals* on the ground that the Consent Election Agreement was but a private agreement between private parties—the company

*The Board argued: ". . . It is, therefore, apparent that the election was held pursuant to an agreement of the parties, and not a statute regulating commerce. . . ." (p. 10, Brief for Appellees, in

and the union. The pertinent language from the opinion follows:

> "At the outset we are met with the question whether a District Court of the United States has any jurisdiction in a law suit arising out of the facts just stated. We conclude that it has not and this conclusion makes irrelevant and unnecessary the consideration of the other highly interesting questions which the argument before us has covered. The contract providing for the election, made by the three parties mentioned, was an ordinary, private agreement. It is true that it carried with it an approval by the Regional Director of the National Labor Relations Board. That, we take it, is not what gives the agreement its validity, but simply showed that the Board had no objection to an agreement among the parties concerning a matter about which petition had previously been filed with the Board. By the agreement the parties thereto consented among themselves that the issues as to representation should be settled in the way which the agreement prescribed. While we were advised by counsel and accept as true, the statement that the agreement was executed upon a form provided by the Board and customarily used in these consent elections, the use of the form did not change the fact that the agreements therein contained were those of the parties themselves, neither imposed upon them by any public body, statute or regulation, nor deriving their vitality from such sources. The agreement stated that the Regional Director was to conduct the election and be the judge. But it could have provided that any other reputable citizen, such as the local superintendent of schools, minister of the

Sun Ship Employees Association, Inc., v. National Labor Relations Board et als., Third Circuit, No. 8452, filed November 3, 1943.

local church or mayor of the city was to act in that capacity.[3]

"A law suit arising out of the alleged violation of the terms of any such agreement must, as a law suit brought upon any other alleged breach of contract in the federal courts, be subjected to the usual and obligatory test as to federal jurisdiction. The rights involved are those of parties to a contract, but whether that contract is for the purchase and payment of merchandise or the holding of an election to select a bargaining agent, the parties to a law suit arising out of the agreement cannot litigate the question in a federal court unless the usual statutory basis for jurisdiction is present. We have here no allegation that the amount in controversy exceeds $3,000; more important, we do not have here, as the plaintiff's counsel frankly admits, the requisite diversity of citizenship. The litigation therefore, is halted at the threshold by the lack of facts which open the door to federal litigation" (pp. 745-746).

"[3] Counsel for the Board advised us at the argument that persons of this type have frequently been called on to act as judges in consent elections and have sometimes conducted the elections."

As pointed out in the foregoing excerpt, not only is the Consent Election Agreement merely a private agreement, but the Regional Director acts in a private and not an official role. As the opinion and footnote indicate, some person with no official connection with the Board could just as well occupy the position occupied by the Director under the agreement and frequently does.

Buttressing this fact as to the entire private and unofficial nature of consent election proceedings are the rules of the Board itself. Section 12 of Article III of the Board's

Rules and Regulations deals with Consent Election Agreements. An examination of this section—it is quoted on pages 81-82 of petitioner's brief—makes clear that the Board merely grants its approval to the making of private agreements "leading to a statement by the Regional Director of the facts ascertained after such consent election or cross check *but not resulting in a certification by the Board under Section 9(c) of the Act*" (Petitioner's Brief, p. 82; emphasis added). It will be noted that in the present case, consonant with the above rule, the Regional Director merely issued a statement that *he* determined that the Union had been selected as the bargaining agent (R. 111). The Board itself issued no certification under Section 9(c) of the Act and there is today no official certification in effect that the Union is entitled to exclusive bargaining rights.

In the foregoing situation the respondent has refused to deal with the Union, claiming that it was not validly chosen as bargaining agent by a majority of the employees, and that the Regional Director—for the purposes of the consent agreement merely a private person—made a gross error in including the ballot of a non-employee and in refusing even to hear the respondent on its objection. The Board thereupon issued a complaint that, because of this refusal to bargain, the respondent had committed an unfair labor practice, and at the hearing on this complaint the Board refused and declined to determine whether in fact the Union was the bargaining agent, but ruled that, because some private person in Boston, who might have been anybody, had, acting under a private agreement between some of the parties to be affected, a type of agreement, not provided for or recognized by statute, made a "finding and determination" (R. 111) that the Union was validly chosen, that was as far as the Board need go and it might, without more, hold the respondent guilty of an unfair labor practice.

The foregoing procedure does not, it is submitted, comply with statutory requirements. The Board is given authority to prevent persons from engaging in unfair labor practices (Section 10(a)). To that end it is authorized to issue complaints and hold hearings, at the conclusion of which it must make its findings of fact on the matter at issue (Section 10(c)). These findings, if supported by evidence, the Act makes conclusive so far as judicial review is concerned (Section 10(e)). There is no provision anywhere for delegation by the Board of its duty to find facts on which its order is to be based.

In the present case the Board did not follow the above procedure. It issued a complaint and it held a hearing. At the hearing, however, it declined to go into the basic question of fact as to whether the bargaining agent with which the respondent had refused to deal was the true and legally chosen bargaining agent. Instead, it accepted substantially as final the statement of a private person that he had determined that the bargaining agent was properly chosen and, refusing to let the Company go behind this statement to show what the true facts were, held the respondent guilty of an unfair labor practice irrespective of the facts. This, it is submitted, was fundamental error.

Cf. *Morgan* v. *United States*, 298 U.S. 468, 481-482, in which this Court said:

> "There is thus no basis for the contention that the authority conferred by § 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact,

and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

"This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

The Act authorizes the Board to investigate representation controversies and certify the representative (Section

9 (c); Board's Brief, p. 76). There is no authority in the Act for the decentralization of the certification function—whether by the device of consent elections, with a Regional Director's "consent determination" taking the place of the Board's certification, or otherwise.

Whatever help the Board may employ in its investigations, whatever advice it may ask from subordinates and consider, the final say, the decisive act of judgment, the certification of representatives, is vested exclusively in the Board. No word in the Act suggests any other possibility.

The provisions of Section 9 (c) of the Act respecting determination of choice of representatives are exclusive. The Board is a regulatory administrative board, and there is no power given in the Act to substitute the decision of any arbitrator selected by any parties for the certification of the Board or to accomplish the same result by setting up a rule of decision whereby the Board binds itself to accept such third party decision unless arbitrary or capricious.

Viewed from this standpoint, the arbitration cases cited in the Board's brief (pp. 59-60) are entirely irrelevant. They are cases dealing with the arbitration of private rights by private parties or cases in which the Government, through a contracting officer duly authorized, has entered into a contract for the purchase of supplies or the performance of work and in which the Government's rights are similar to those of a private party. None of them indicate any basis for holding that a public regulatory board may divest itself of the power and duty imposed upon it by an act of Congress by submitting matters proper only for its own decision to an arbitrator, or by accepting as binding upon such Board the decision of an arbitrator on a matter within the field of public regulation committed to such Board. *A fortiori*, there is no authority for submitting such determination to an arbitration proceeding to which

only some, but not all, of the interested persons are parties.

It may be suggested that the view here presented means the end of the usefulness of Consent Election Agreements. This, of course, may be true, but, if it is true, it is a consequence of the law and furnishes no excuse for departing from the law. If Congress had wished to permit the Board to delegate its tremendous fact-finding powers to private persons, it could have easily done so. It did not do so, and the fact that the Board has found it convenient to assume an authority not granted it is no argument for permitting the controversial usurpation of that authority. As a matter of fact, however, it is probable that, notwithstanding the view here urged, the Consent Election Agreement will continue to serve the same useful function as in the past and serve to produce an acceptable determination of representatives in those cases where the only question is the mechanical one of determining whether there were more votes cast for a union than against it.

Point V.

THE NATIONAL LABOR RELATIONS BOARD MAY NOT DELEGATE ITS STATUTORY DUTIES OR AVOID JUDICIAL REVIEW OF ITS ACTS BY PROVIDING BY RULE THAT IN THE CASE OF CONSENT ELECTIONS THE RULINGS OF THE REGIONAL DIRECTOR SHALL BE FINAL.

For the first time the Board has in its brief filed in this Court sought to support its decision by reference to Article III, Section 12, of its Rules and Regulations, wherein it is provided that in the case of a consent election the "rulings of the Regional Director" shall be final (Petitioner's Brief, p. 54). This provision of the rules was not urged by counsel for the Board before the Board, nor is it referred to in

the Board's decision or made the basis of the Board's decision. In its brief and oral argument before the Circuit Court of Appeals the Board made no reference to this rule. The rule is not part of the record certified from that Court to this. The rule has been brought into the case for the first time by inclusion as an appendix by the Board to its brief in this Court (Petitioner's Brief, pp. 81-82). There is thus raised the question of whether the Board may at this juncture properly ask to have its decision considered on a basis other than that upon which it was made. If that question is passed, there is then the question of whether the Board can by a rule of this character avoid its statutory duty to determine bargaining representatives, and can by rule avoid judicial review of action taken by it or by any of its agents. We shall discuss these questions in the order outlined.

A.

Section 12 of Article III, Series 3, of the Board's Regulations, effective November 26, 1943, reads in part as follows:

> "The method of conducting such consent election shall be consistent with the method followed by the Regional Director in conducting elections directed by the Board pursuant to Section 9, Article III, of the Rules and Regulations, *except that the rulings of the Regional Director shall be final, and the statement of the Regional Director of the results thereof shall be final*" (Board's Brief, p. 82, emphasis added).

The foregoing provision of the Regulations is, it is submitted, irrelevant in the present case because the decision of the Board was not based thereon, but instead on a finality

doctrine respecting the finality proviso in Consent Election Agreements.

The finality proviso in the Consent Election Agreement reads as follows:

> ". . . provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to eligibility of votes, raised by any party hereto relating in any manner to the election" (R. 104, par. 1).

The finality doctrine of the Board is a rule of decision adopted by the Board based on the analogy of judicial enforcement at common law of agreements to abide by the award of an arbitrator applied to the finality proviso in Consent Election Agreement.

The finality doctrine was applied in a Board's decision in the case of *Capitol Greyhound Lines*, 49 N.L.R.B. 156, decided April 27, 1943, already referred to.

The Consent Election Agreement in that case was dated August 22, 1942 (49 N.L.R.B. at p. 163). It contained the usual finality proviso (*id.*, p. 164). The vote of Nolan was not challenged, but the respondents filed objections to the determination of the results based on the election (*id.*, p. 165), alleging that Nolan had been improperly permitted to vote although his name was on the list of eligible voters (*id.*, p. 165). The Regional Director overruled the objections, including that respecting Nolan's vote; and the Board ruled that the respondents did not have the right to appeal the Regional Director's rulings on objection to the Board (*id.*, p. 167). In the unfair labor practice proceeding, the Trial Examiner ruled that Nolan should not have been counted, because he was not entitled to be on the eligibility list (*id.*, pp. 169-170), although he was a bus driver at the time he voted. The Trial Examiner recommended dismis-

sal of the complaint (*id.*, pp. 171-172). The Board reversed. The Board found that the ruling of the Regional Director was neither arbitrary nor capricious (*id.*, p. 159), and stated:

> "In the absence of such conduct, we feel ourselves bound by the terms of the agreement providing for the finality and binding effect of the Regional Director's determination to the same extent as a court is bound by an agreement to abide by an arbitrator's award" (*ibid.*).

Two judicial decisions are cited in a note; also a reference to Williston on Contracts and the Restatement of the Law of Contracts.

It was approximately seven months after the decision of the *Capitol Greyhound Lines* case by the Board (April 27, 1943) that the finality provision of the Regulations first went into effect (November 26, 1943).

In the *Aetna Fire Brick Company* case, 56 N.L.R.B. 849, decided May 25, 1944, the Consent Election Agreement was dated December 10, 1942 (56 N.L.R.B. at p. 852), and the Board said:

> "Under the circumstances, and regardless of how we might have determined the question if the respondent had not authorized the Regional Director to determine it, we cannot say that the Regional Director's determination was arbitrary and capricious, or that it lacked substantial support in the record. Accordingly we shall not disturb his determination that Gray did not come within the appropriate unit" (56 N.L.R.B. at p. 854).

The Consent Election Agreement in the instant case was executed April 27, 1944 (R. 106), approximately five months

after the "effective date" of the finality provision of the Regulations.

Notwithstanding this fact, neither the Trial Examiner in his Intermediate Report (R. 27) nor the Board in its decision (R. 10-13) placed any reliance on the finality provision of the Regulations. The Trial Examiner concluded that the Regional Director's certification* of the Union was neither arbitrary nor capricious and was accordingly binding upon the parties to the Agreement for Consent Election, citing the *Capitol Greyhound Lines* and *Aetna Fire Brick* cases (R. 27, n. 14). The Board said:

> "As we have previously held [referring to the *Capitol Greyhound Lines* and *Aetna Fire Brick* decisions] we will not disturb the rulings of a Regional Director on questions arising out of a consent election unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" (R. 11).

This was in line with the contention made by counsel for the Board at the hearing before the Trial Examiner (R. 42-43).

The Court below was not called upon to pass on the question whether the finality provision of the Regulations furnished a legal justification for the Board's decision, since the Board had not based its decision on the finality provision of the Regulations. *Securities & Exchange Comm.* v. *Chenery Corp.*, 318 U.S. 80.

The Court below did not pass on the question whether the finality provision of the Regulations justified the Board's

*"Certification" is inaccurate. The Board may certify (Act, Section 9(c)), but there is no provision for delegation of its authority. The Consent Election Agreement described the Regional Director's action as a "consent determination of representatives" (R. 105).

decision, nor was any determination of that question implicit in the decision of the Court below, since it was bound only to judge the Board's decision on the ground on which it was explicitly based, viz., the common law analogy of an agreement to abide by an arbitrator's award. The Board's decision in the instant case incorporated by reference the basis of the decision of the *Capitol Greyhound* case (R. 11, n. 1).

Consequently it was not open to the Board, on petition for certiorari to the Court below, to raise the question "whether a regulation of the board [referring to the finality provision of the Regulations] is valid" (Board's Brief, p. 2, par. 2).

B.

But if the Board should be permitted at this late stage of the proceedings, in the instant case, to shift its ground to the finality regulation, as a means of saving its decision, it does not really advance itself any, for everything which has been said under Point IV, *supra*, as to the impropriety of the Board's accepting the findings of a private person under a private agreement and thus avoiding its own duty to make findings would apply. Whether the Board elects to accept such findings as a matter of decision in the individual case or undertakes by rule to do so, the practice is equally repugnant to the statutory requirements. This aspect of the matter will not be further elaborated here, but reference is made to the discussion already had under Point IV, *supra*.

In addition to the foregoing it is of interest to inquire if the quoted provision of the Regulations fulfills the statutory test that it is "necessary to carry out the provisions of the Act" (Act, Section 6; Board's Brief, Appendix, p. 75). The Act has numerous provisions. It is inconceivable

that the rule-making power was intended by Congress to enable the Board to promote certain provisions of the Act while nullifying the effect of other provisions of the Act.

There may be a distinction between what is "necessary" and what is merely "convenient" or desirable to the Board for one reason or another. It would be difficult to show a real necessity for dispensing with Board-directed elections. The most that can be said is that the consent election procedure may save time in some instances. But non-reviewability of the Regional Director's rulings is not a necessary feature, because, as pointed out in the Report of the Attorney General's Committees on Administrative Procedure (1941):

> "While the objection procedure entails some small delay in completing proceedings, its retention is no doubt desirable in order to dispose of all doubts concerning the fairness of the elections conducted at the Board's direction. In any event, there is no substantial postponement of certification following the counting of the ballots" (Part V, "National Labor Relations Board," p. 36).

The provisions for judicial review contained in the Act have been relied on by this Court in upholding the constitutional validity of the Act over the objection that the Act offended against the constitutional requirements governing the creation and action of administrative bodies. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47.

The Board's actions and determinations of fact and law in representation proceedings were intended by Congress to be subject to the same court review as was provided for other determinations of the Board in unfair labor practice proceedings under Sections 10(b) and 10(c) of the Act (House Report, No. 1147, Committee on Labor, 74th Con-

gress, 1st Session, p. 23, quoted in *A. F. of L.* v. *Labor Board*, 308 U.S. 401, 410, 411, note 3). The qualification in Section 9(d) of the Act is not on the scope of review of representation proceedings, but as to the time when and circumstances under which such review may be had.

The attempt to make the "consent determination of representatives" by Regional Directors final by means of the finality provision of the Regulations is just as fully defiant of the declared purpose of Congress as would be a regulation that a certification by the Board under Section 9(d) should be final. The finality provision actually enacted is an obvious attempt to exempt the acts of administrative agents of the Board from judicial review.

Willingness of the Board to review the Regional Director's rulings to determine whether they are "arbitrary or capricious" does not give the scope of review contemplated by Section 10(e) or Section 10(f) of the Act, which is applicable to Section 9(c) proceedings.

Conclusion.

For reasons hereinbefore stated, we respectfully submit that the decree of the Court below should be affirmed.

MALCOLM DONALD,
JOHN T. NOONAN,
EDWARD E. ELDER,
Attorneys for Respondent.

October, 1946.

P.10

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1946.

National Labor Relations Board Petitioner, *v.* A. J. Tower Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[December 23, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

The issue here concerns the procedure used in elections under the National Labor Relations Act[1] in which employees choose a statutory representative for purposes of collective bargaining. Specifically, we must determine the propriety of the National Labor Relations Board's refusal to accept an employer's post-election challenge to the eligibility of a voter who participated in a consent election.

The respondent and a union entered into an agreement to conduct an election by secret ballot on May 5, 1944, under the supervision of the Board's regional director, to determine whether the employees at respondent's Roxbury plant in the unit defined in the agreement desired to be represented by the union. The agreement was approved by the regional director and provided that the election was to be held "in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board."

The agreement set forth the qualifications for participation in the election. Only those who appeared on the pay-roll on April 21, 1944, were eligible; included were those employees who did not work at the time because they were ill, or on vacation, or temporarily laid off, or in the armed forces. The respondent had the duty of furnish-

[1] 49 Stat. 449, 29 U. S. C. § 151, *et seq*

ing the regional director with an accurate list of the eligible voters, together with a list of the ineligible employees.[2] The list of eligible voters was duly submitted on May 1, 1944.

The agreement further provided that both the union and the respondent could have observers at the polling places to assist in the handling of the election, to challenge the eligibility of voters and to verify the tally. If challenges were made and if they were determinative of the results of the election, the regional director was to investigate the challenges and issue a report thereon. All objections "to the conduct of the ballot" or "to a determination of representatives based on the results thereof" were to be filed with the regional director within five days after issuance of the "Tally of Ballots." If the regional director sustained the objections, he had the power to void the results and order a new election. The determination of the regional director was to be final and binding upon any question, "including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election." Cf. Article III, §§ 10 and 12, of the Board's Rules and Regulations (Series 3, effective Nov. 26, 1943).

The balloting took place on May 5 in accordance with this agreement. After the ballots were counted, the union and the respondent signed a "Tally of Ballots," in which the regional director certified that, of the 230 valid votes counted, 116 were cast for the union and 114 against it, with one other ballot being challenged by the union.[3] Four days later, on May 9, respondent's counsel wrote the

[2] Among the ineligible persons were those who had quit or been discharged for cause and had not been rehired or reinstated prior to the date of the election.

[3] It was unnecessary to rule on the challenged ballot since it could not affect the result of the election, even though the ballot proved to be against the union.

regional director that subsequent to the election "it came to the attention of the management of the Company that Mrs. Jennie A. Kane, one of the persons who voted at the election, was not at the time an employee of the Company."[4] The letter explained that Mrs. Kane was employed by respondent from March 16, 1943, through March 24, 1944, but that after the latter date she had never reported again for work and had never appeared at the plant except for purposes of voting on May 5. It was admitted that the respondent, "not being advised by Mrs. Kane of any intention on her part to leave their employ, assumed that she was ill, and continued her among their list of employees and, therefore, did not exclude her from the list of employees they believed eligible to vote." The letter accordingly challenged Mrs. Kane's right to vote, as well as the ballot cast by her. A hearing was requested for the purpose of passing upon the one ballot challenged by the union. If that challenge were not sustained and the ballot proved to be a vote against the union, Mrs. Kane's ballot would become material to the result of the election; on that condition, the respondent requested a hearing on its challenge to Mrs. Kane's vote.

A hearing on the matters raised by this letter was held before the regional director. He subsequently made a report in which he found that respondent included Mrs. Kane's name on the list of eligible voters submitted on May 1 on the assumption that she was ill and had not quit

[4] The letter recited that "it has now come to their attention, however, that on April 28, 1944, Mrs. Kane filed with the Division of Employment Security of the Commonwealth of Massachusetts a claim for unemployment benefits stating, in connection with that claim, that she had left the employ of the A. J. Tower Company in March, 1944, and that her reason for leaving was that she 'could not continue to do heavy work of carrying bundles which was part of her job.' The Company has also learned that on the same day, April 28, 1944, Mrs. Kane visited the United States Employment Office and was placed on its list of persons available for employment."

her job; that respondent made no attempt between May 1 and May 5 to remove Mrs. Kane's name from the list, although prior to the election respondent received by mail a notice of Mrs. Kane's claim for unemployment compensation; that respondent's observers at the polls had not challenged Mrs. Kane when she voted in their presence; and that these observers certified before the ballots were counted that the election had been properly conducted. The regional director also found that the evidence was conflicting as to Mrs. Kane's actual status.[5] But he concluded that under the circumstances the respondent had waived its right to challenge her vote or to object to the election on this ground. This determination made it unnecessary for him to rule on the ballot previously challenged by the union, since it could not affect the result. He thus found that the union had received a majority of the valid votes cast and was the exclusive representative of the employees in the appropriate unit.

The respondent thereafter refused to bargain with the union in question. Upon a complaint issued by the Board, the respondent admitted its refusal but denied that the

[5] An agent of the Board interviewed Mrs. Kane and was told by her that: "On April 28, 1944, I applied for Unemployment Compensation benefits, thinking I was entitled to such because of my illness. At no time, prior or since, have I considered myself not an employee of the A. J. Tower Co. I have never requested my release of the A. J. Tower Co. and in fact I intend to return to the Company when I have regained my strength. I did not think my application for unemployment benefits would be considered a termination from the Company. . . . On May 5, 1944, when I presented myself at the election polls at the A. J. Tower Co., I considered myself as an employee of the Company and therefore entitled to cast a ballot. I still consider myself an employee of the A. J. Tower Co."

But the regional director pointed out that, despite this statement, subsequent investigation confirmed the fact that Mrs. Kane advised the Division of Employment Security on April 28, 1944, that she had left her employment with the respondent in March because of the heavy work in carrying bundles. See note 4, *supra*.

union had ever been designated by a majority of the employees in the appropriate unit. It asserted that the election of May 5 was inconclusive on the subject because if Mrs. Kane's ballot were subtracted from the union's total and if the ballot challenged by the union were opened upon overruling the challenge and proved to be against the union, the outcome of the election would be a tie vote. The Board, after the usual proceedings, held that it would not disturb the rulings of a regional director on questions arising out of a consent election "unless such rulings appear to be unsupported by substantial evidence or are arbitrary or capricious" and that no such grounds for disturbing the ruling were present in the instant case. As an alternative ground for its action, the Board held that the regional director's refusal under the circumstances to permit an attack on Mrs. Kane's status as a voter after the results of the election had been announced "is in complete accord with the established principles and policy of the Board"—which excluded post-election challenges "because of our belief that otherwise an election could be converted from a definitive resolution of preference into a protracted resolution of objections disregarded or suppressed against the contingency of an adverse result." See also *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512. The Board accordingly ordered respondent to cease and desist from its unfair labor practice and to take the affirmative action of bargaining collectively with the union. 60 N. L. R. B. 1414.

The First Circuit Court of Appeals, however, set aside the Board's order. 152 F. 2d 275. It construed the Act as making it a jurisdictional prerequisite to a determination that an employer has committed the unfair labor practice of refusing to bargain collectively that the union with which he has refused to deal should have been chosen by a majority of those voting who were in fact employees. It held that since the vote challenged by the union may have been cast against it and since Mrs. Kane was not

found to have been an employee on the crucial date, there may have been a tie vote and the Board was without jurisdiction to find the respondent guilty of a violation of § 8 (5). We granted certiorari because of the importance of the matter in the administration of the Act and because of a conflict between the result below and that reached by the Sixth Circuit Court of Appeals in *N. L. R. B.* v. *Capitol Greyhound Lines*, 140 F. 2d 754.

As we have noted before, Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31, 37; *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 226; *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 458. Section 9 (c) of the Act authorizes the Board to "take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." In carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in § 9 (a), a rule that "is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions." S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. It is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.

The principle of majority rule, however, does not foreclose practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud. Indeed, unless such adjustments are made, the democratic process may be perverted and the election may fail to reflect the will of the majority of the electorate. One of the commonest protective devices is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are

given absolute finality. In political elections, this device often involves registration lists which are closed some time prior to election day: all challenges as to registrants must be made during the intervening period or at the polls. Thereafter it is too late. The fact that cutting off the right to challenge conceivably may result in the counting of some ineligible votes is thought to be far outweighed by the dangers attendant upon the allowance of indiscriminate challenges after the election. To permit such challenges, it is said, would invade the secrecy of the ballot, destroy the finality of the election result, invite unwarranted and dilatory claims by defeated candidates and "keep perpetually before the courts the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with the close of the polls." Cooley, Constitutional Limitations (8th ed., 1927), p. 1416.

Long experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge and its identity has been lost, its validity cannot later be challenged. This rule is universally recognized as consistent with the democratic process. And it is generally followed in corporate elections. The Board's adoption of the rule in elections under the National Labor Relations Act is therefore in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.

Moreover, the rule in question is one that is peculiarly appropriate to the situations confronting the Board in these elections. In an atmosphere that may be charged with animosity, post-election challenges would tempt a losing union or an employer to make undue attacks on the eligibility of voters so as to delay the finality and statutory effect of the election results. Such challenges

would also extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the pay-roll list in the hope that they might escape challenge before voting, thereafter giving rise to a charge that the election was void because of their ineligibility and the possibility that they had voted with the majority and were a decisive factor. The privacy of the voting process, which is of great importance in the industrial world, would frequently be destroyed by post-election challenges. And voters would often incur union or employer disfavor through their reaction to the inquiries.

We are unable to say, therefore, that the Board's prohibition of post-election challenges is without justification in law or in reason. It gives a desirable and necessary finality to elections, yet affords all interested parties a reasonable period in which to challenge the eligibility of any voter. And an exception to the rule is recognized where the Board's agents or the parties benefiting from the Board's refusal to entertain the issue know of the voter's ineligibility and suppress the facts.[6] The Board thus appears to apply the prohibition fairly and equitably in light of the realities involved.

The reliance of the court below upon the asserted jurisdictional requirement was misplaced. It is true that it is an unfair labor practice for an employer to refuse to bargain with a union only if that union was chosen by a majority of the voting employees. But the determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion. The rule prohibiting post-election challenges is one of those rules. When it is applied properly, it cannot deprive the Board of jurisdiction to find an unlawful failure to bargain collectively. That is

[6] See *Matter of Wayne Hale*, 62 N. L. R. B. 1393; *Matter of Beggs & Cobb, Inc.*, 62 N. L. R. B. 193.

true even where it subsequently is ascertainable that some of the votes cast were in fact ineligible and that the result of the election might have been different had the truth previously been known. The rule does not pretend to be an absolute guarantee that only those votes will be counted which are in fact eligible. It is simply a justifiable and reasonable adjustment of the democratic process.

There is no basis in the instant case for disregarding the Board's policy in this respect. The fact that the respondent may have been honestly mistaken as to the status of Mrs. Kane has no relevance whatever to the justification for the use of the policy. And nothing in the consent agreement constituted a waiver of the policy by the Board. On the contrary, the agreement expressly stated that the election was to be held in accordance with "the customary procedures and policies of the Board," which would include the policy prohibiting post-election challenges. The provision as to the filing of objections "to the conduct of the ballot" and "to a determination of representatives based on the results thereof" within five days after issuance of the "Tally of Ballots," a provision which was quite separate from that relating to challenges, obviously has no application here. Objections and challenges are two different things in electoral parlance. Objections relate to the working of the election mechanism and to the process of counting the ballots accurately and fairly. Challenges, on the other hand, concern the eligibility of prospective voters. The Board uses this clear distinction as a matter of policy and we are not free to disregard it.[7]

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[7] "The Board follows a policy of differentiating between objections to the conduct of an election and challenges [to] the eligibility of voters and it does not ordinarily permit challenges under the guise of objections after the election." *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 512. Cf. *Matter of Great Lakes Steel Corporation*, 15 N. L. R. B. 510.

Neither the record in this case nor the past history of the policy against post-election challenges justifies an assumption that the interests of the anti-union employees in this election were inadequately protected. Due notice of the manner and conduct of the election was given to all employees; and, despite the lack of any affirmative provisions in the consent agreement, there was no indication that any of the employees were prohibited from examining the eligibility list or from challenging any prospective voter. Nor was there competent evidence that any anti-union employee made any objection, either before or after the election, to the procedure adopted or to the casting of any ballots.[5] Moreover, the representatives of the Board, as well as those of the respondent, were bound to perform their electoral functions on behalf of all employees, including those with anti-union sentiments. In the absence of any evidence that such representatives discriminated against the anti-union employees in preparing the eligibility list or in raising timely eligibility issues, we cannot say that the interests of those employees were inadequately represented.

Since we rest our decision solely on the propriety of the Board's policy against post-election challenges, it is unnecessary to discuss the effect to be given by the Board to the

[5] The respondent's factory superintendent testified that an unidentified employee came to him and "objected to the vote of this Jennie Kane" several days after the election and even longer after the receipt by respondent of the notice of Mrs. Kane's unemployment compensation claim, which had been mailed to respondent before the election. This testimony was admitted merely to show "how the company became interested in the question" of Mrs. Kane's eligibility. The Board, of course, was not compelled to accept this hearsay testimony as proof of an objection to Mrs. Kane's vote by an anti-union employee or as an indication that the interests of anti-union employees may have been inadequately represented.

regional director's ruling that the respondent waived its right to challenge Mrs. Kane's vote or the effect to be given to the terms of the consent election agreement apart from the general policy.

It follows that the court below erred in refusing to enforce the Board's order in full.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1946.

National Labor Relations Board, Petitioner, v. A. J. Tower Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[December 23, 1946.]

Mr. Justice Jackson, dissenting.

If the only interests affected were the complaining employer and the victorious union, I should agree with the Court's decision. But there is a third and, as usual, a forgotten interest here—those employees who did not want to be represented by the union.

The election was held by agreement between the employer and the union which was seeking to organize the plant. The Company was to furnish a list of eligible voters. The Company and the union were each to have observers attend, with the right to challenge the voters. The agreement did not give anti-organization employees either observers or the right to challenge. The certified result of 116 union against 114 anti-union votes was reached by not counting a ballot which the union challenged and by counting the ballot which the Company now points out was probably invalid. Mrs. Kane's vote, no matter whether valid or invalid, is thus allowed to decide the election.

It is in evidence and undisputed that after the election, an employee—presumably anti-union, from the circumstance that he was objecting—raised the question that Mrs. Kane, who was carried on the Company's eligible list because the Company believed she was absent for illness had, in fact, left the employ of the Company with no intention to return. If that is true, she was not a qualified voter.

But because there was no challenge at the time her ballot was cast, the Court holds there can be no inquiry into its validity. Comparison with the practice at general public elections is specious, for in those elections every citizen has a right of challenge and registration lists usually are made up and available in advance. No comparable safeguards for the employees opposed to the union appear to exist here, though both the employer and the union were protected.

The Court takes the position that although every other interest has affirmative protection, there is no necessity for similar affirmative protection to the anti-union employees. Despite the fact that both of the contracting parties were careful to provide such protection for themselves, the Court assumes it is unnecessary for the third interest. The Court says that in the absence of evidence, it will assume that such interests were adequately represented, at the same time closing the door to hearing evidence as to whether those interests were prejudiced unless those who are denied affirmative representation or challenge rights should have made affirmative objection before the wrong was consummated by casting the illegal ballot. And, of course, the members of such a minority have no standing to bring their problems either to the Board or to the Court. We hear of their grievance, if at all, only through its being identical with some complaint which the employer raises.

The Court fears that to permit inquiry into the validity of Mrs. Kane's vote would "extend an opportunity for the inclusion of ineligible pro-union or anti-union men on the payroll list" who would be challenged after the election in the hope of voiding an unwanted result. Of course, there are opportunities for manipulation of such a list, for collusion between employer and favored groups, for fraud, and for honest mistakes.

But if the Court is concerned to keep the elections pure, why close the door to proof of such corruption or mistake when it operates against an anti-union group, because it has not been challenged by one of the parties to it: to wit, the employer? In the usual election, it may be desirable to put an end to challenges at the time when the ballots become intermingled and indistinguishable. But to justify cutting off inquiry, it should appear that all persons interested in the election have had adequate opportunity to question the ballots cast. As long as no such provision is made for employees who are opposed to organization, I would protect their rights by allowing post-election challenges on such grounds as are urged here.

Of course the protection this gives is far from satisfactory. The challenge must be initiated by the parties the Board recognizes, the employer or the union. But there will be some instances in which their interest coincides with that of the anti-union employees. On the other hand, I can scarcely think of a more perfect device for encouraging unscrupulousness, than to invest it with finality against all inquiry either by the Board or the courts. Here half the employees are forced to accept union representation as the result of an election in which they were not allowed to protect the ballot, and those who were, failed to do so. If I really wanted to discourage fraud, collusion, and mistakes, and protect the integrity of elections and the rights of both minority and majority, I should hold that such elections can be looked into whenever irregularity appears to have affected the result.